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No. 99-500

Supreme Court, U.S.
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In The

Supreme Court of the United States

AIRPORTS COUNCIL
INTERNATIONAL–NORTH AMERICA,

Petitioner,

vs.

UNITED STATES DEPARTMENT
OF TRANSPORTATION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

In their briefs in opposition, the Department of Transportation and Air Transport Association do not engage the substantive issues presented. They do not explain why *Chevron* should trump *Pennhurst's* "clear statement" requirement. While they do not dispute that DOT's decision requires LAX to give the airlines free use of its most valuable asset, they offer no rationale for why the airlines should be entitled to such a subsidy. They also studiously avoid explaining why LAX's fair market value-based charge is actually unreasonable – although it was the airlines' burden to establish that the fee was unreasonable.

This case presents an unmistakable conflict between the circuits on an important federal question regarding the interpretation of federal grant conditions, in addition to an intracircuit conflict in the circuit most likely to review DOT decisions regarding airport rates. The Court has not reviewed an airport rates case since the enactment of the Federal Aviation Authorization Administration Act of 1994, 49 U.S.C. § 47129, following the Court's decision in *County of Kent*. Congress has expressly required that airports be as self-sustaining as possible and has chosen not to allow the Secretary to set the level of airport fees. Here, the Secretary has set the level of the airfield land rental charge at zero, ensuring that LAX will not be as self-sustaining as possible.

I. The Case Presents Issues of Profound National Importance

ATA asserts that this case merely involves "an isolated, unrepeated dispute between a single airport and the airlines serving it." ATA Brief at 21. Nothing could be further from the truth. ACI-NA has been an intervenor in this case at every stage below because of its profound importance to the nation's airports, the state and local governmental proprietors that have the responsibility of operating them, and the national air transportation system. ACI-NA is deeply concerned about the effect this case may have on the ability of airports to meet the needs of the 21st century. The nation's airports are already at their breaking point due to capacity limitations and congestion problems. The decision below threatens airports' ability to fund necessary expansion and casts into question their understanding of the terms upon which they have accepted federal development funds.

Squarely at issue in this case is the question of whether DOT may retroactively add new, unstated conditions to federal grant assurances. Almost all of the nation's principal airports have agreed to specified conditions in return for federal grants. Airports cannot be "fully cognizant of the consequences of their participation" if the Department can add conditions not found in the plain language of the grant assurances.

Without complaint from airlines, airports that have accepted federal grants have long charged airlines fair market value-based rental charges for the use of land underlying terminal, cargo and maintenance facilities. The airlines have already argued that the rationale of the

decision below – that the grant assurance to keep the airports open to the public has the "consequence" of removing airports' opportunity cost – should be applied to such other assets to prohibit fair market value charges. The consequence of such a determination, an outflow of airport funds into the pockets of the airlines, would be highly detrimental to airport development.[1]

Another critical issue in this case is whether DOT can openly thwart the will of Congress. Here DOT has determined that a major airport must provide for the airlines' use its most valuable asset (the prime real estate underlying the airfield at LAX) without charge for as long as it operates as an airport. Congress has expressly stated that airports are entitled to collect reasonable rental charges from air carriers for their use of airport facilities and has required that airports charge fees that will make them "as self-sustaining as possible." The decision below ignores these express requirements.

Of equal importance is the question of whether DOT can force state and local governmental proprietors to give profit-making commercial airlines subsidies in the form of below-fair market value charges for their use of locally-funded airport assets. Yet another issue is whether

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[1] As the *LAX I* court noted, nothing in existing law mandated the use of historical costs or any other "single formula" in airport ratemaking. App. 89a (quoting *Federal Power Com. v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586, 62 S. Ct. 736, 86 L. Ed. 1037 (1942)). Different methodologies produce reasonable rates and airports must have the flexibility to choose the appropriate methodology based on individual circumstances.

the authority that Congress gave the Secretary to determine the reasonableness (but not set the level) of airport fees permits the Secretary to impose a form of regulation that is more draconian than utility regulation (in which the regulators are expressly allowed to set the level of the fee).[2]

Despite the airlines' rhetoric about potential unlawful diversion of LAX airport revenues – a red herring upon which neither DOT nor the D.C. Circuit based any of their decisions in this case – the issues presented are neither insignificant nor isolated. Only the Court can resolve the critical issues presented.

II. Respondents Have Utterly Failed to Address the Merits of ACI-NA's Petition

DOT and ATA do not address the fact that, in violation of *Pennhurst*, DOT has construed a grant assurance to impose an unstated condition: Grant recipients who agreed to keep an airport open to the public are limited to recovery of their historical costs. DOT and ATA do not explain how airports that accepted the grant condition could possibly have known that such a condition existed. DOT *itself* was not cognizant of such a consequence; if it were, it would have surely addressed it in its Final Decision, in which DOT laid out several other rationales for requiring the use of historical cost (each of which was

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[2] In utility regulation, where the use of historical costs is required, it is always coupled with an allowed rate of return. Here the Secretary is mandating the use of historical costs without providing *any* allowed rate of return on the assets subject to regulation.

rejected by the *LAX I* panel). Only on remand did DOT discover this "consequence," which it now argues flows from the grant language.

After having urged the Secretary on remand to adopt its ill-conceived grant condition rationale, ATA attempts an end-run around the *Pennhurst* prohibition by claiming that the Secretary's decision on reasonableness was "independent" of the grant assurances. *See* ATA Brief at 13. The Secretary's decision unquestionably rests on the airlines' novel construction of the grant assurance.[3]

DOT and ATA do not explain the non sequitur in the conclusion that once LAX decided to forego alternative uses of the land (thus incurring opportunity costs), it no longer had the opportunity to use the land for any other purpose and therefore had no opportunity costs. They also do not explain how the "benefits" LAX provides to Los Angeles have anything to do with the reasonableness of the fee, except to repeat the *LAX II* panel's statement that Los Angeles invited the Secretary to "think broadly" about opportunity costs and to "consider factors that an economist might take into account." App. 14a-15a. No economist would consider the benefits the airport provides to the City in determining what a reasonable fee should be for airlines' use of airport facilities. Indeed, the

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[3] Both ATA and DOT imply that the decision below was based on other rationales such as other airports' use of historical cost and purported difficulties in determining fair market value, but as the dissent noted, the Secretary's decision "does not suggest that these issues were decisive, and they played no role in the [*LAX II*] panel's affirmance." App. at 116a.

LAX II panel conceded that economists would disapprove of DOT's approach. *See* App. 10a.

Neither DOT nor ATA attempt to respond to the fact that the decision below gives the airlines free use of LAX's airfield land notwithstanding Congress's express authorization that airports charge air carriers reasonable rental charges for the use of airport facilities. It is not surprising that ATA would not want to highlight this fact. DOT provided no explanation for giving the airlines free use of the airfield or why the decision is consistent with the "self sustaining" requirement.

DOT and ATA's failure to explain why the fair market value charge is actually unreasonable is also not surprising because the airlines chose not to challenge the appraisal upon which the fair market value charge was based. App. at 91a-92a. They simply dispute the fact that Los Angeles incurs an opportunity cost in connection with its devotion of the LAX land to the airlines' use, even though the opportunity cost rationale was but one of many justifications for the fair market value charge.

III. Respondents' Arguments Against Review Are Entirely Without Merit

ATA (but not the Solicitor General) erroneously argues that the *Pennhurst* issue was not raised below. *Pennhurst's* prohibition on imposing unstated conditions on recipients of federal funds has been at the center of the case since DOT, on remand, adopted the grant condition argument the airlines had unsuccessfully made to the *LAX I* court. If the *Pennhurst* issue had not been raised below, it would not have been addressed as it was – albeit

superficially – in *LAX II*. *See* App. at 13a. The issue is plainly before the Court, and Respondents cannot escape the fact that there is a conflict between the decision below and the decisions of the Fourth and Seventh Circuits regarding the application of *Pennhurst's* "clear statement" requirement.

ATA and DOT also contend that there is no conflict between the *LAX I* and *LAX II* decisions. ATA asserts that the dissenting judges did not express the view that the *LAX II* decision conflicted with *LAX I*. To the contrary, the conflict is evident from the outset of the dissenting opinion. In it, Judges Williams and Ginsburg state that the *LAX II* panel (contrary to the dissenters' earlier *LAX I* decision) "upholds as reasonable DOT's insistence that the charge for the airport's land be calculated on the basis of historical accounting cost." App. 113a. The dissenters' vigorous disagreement with the *LAX II* decision amply demonstrates the intracircuit conflict.

Respondents also assert that ACI-NA's argument addressing DOT's requirement that state and local governments subsidize profit-making private air carriers was not raised below. Again, they are wrong. This argument was made at each stage below. *See, e.g.*, ACI-NA's Petition for Rehearing and Suggestion for Rehearing En Banc, No. 98-1071 (D.C. Cir., Mar. 22, 1999), at 2, 10 (decision below provides a subsidy to profit-making airlines at the expense of state and local governments; "[n]othing in the applicable legislation suggests, however, that Congress intended to require the States to subsidize air carriers."); Opening Brief of Intervenor ACI-NA in Support of Petitioner, No. 98-1071 (D.C. Cir., Aug. 8, 1998), at 3 ("DOT is

effectively requiring local government proprietors to subsidize profit-making commercial air carriers"); Respondents' Opening Brief on Remand, Docket Nos. OST-97-2329 and OST-95-474 (DOT, May 9, 1997), at 14 ("There is no basis whatsoever to require that profit-making airlines be subsidized by state or local government proprietors.").[4]

Finally, ATA presents a strawman argument, asserting that the ACI-NA's argument is "frivolous" because the AHTA in no way commandeers the legislative processes of the States. However, ACI-NA does not challenge the AHTA here; ACI-NA's argument is directed towards *DOT's* commandeering of state and local governments in defiance of the expressed will of Congress. *See* ACI-NA's Petition at 21-23.

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[4] The fact that ACI-NA did not denominate its argument a "Tenth Amendment" claim is of no consequence; the parties and the lower court were aware of the substance of the claim and review is not precluded simply because it was not so labeled. *See, e.g., Ford v. Georgia*, 498 U.S. 411, 419-20, 111 S. Ct. 850, 112 L. Ed. 2d 935 (1991) (petitioner preserved claim for review where motions below mentioned neither Equal Protection Clause nor Fourteenth Amendment but petitioner alleged that prosecution engaged in pattern of excluding black persons from juries). A petitioner may make any argument in support of a claim made below, as "parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534-35, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) (petitioner can "frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.").

CONCLUSION

For the foregoing reasons and those set forth in ACI-NA's Petition for a Writ of Certiorari, Petitioner ACI-NA, on behalf of the state and local government proprietors of the nation's principal airports, urges that this Court grant this petition to decide the issues of great national importance presented by this case.

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Respectfully submitted,

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